Chapter 7
The dynamics of worker participation in SEs in Luxembourg: towards reinforced rights?

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1. Introduction: the European Company statute and industrial relations in Luxembourg

Since transposing Directive 2157/2001 into national company law[1] in 2006, Luxembourg has figured prominently among those EU Member States with the highest number of European Companies (SE). Current available data point towards continuing dynamism with regard to SE set-ups and company seat transfers to and from Luxembourg in line with SE legal provisions. SEs have been established in all the pivotal economic sectors (finance, insurance, health, chemicals) of the country, which reflects developments in other EU countries (Rehfeldt *et al.* 2011: 29). Their number has increased in tandem with the number of companies opting for long-established business formats (STATEC 2011: 298) such as the *société anonyme* or the *société à responsabilité limitée* (SA and SARL). Recent SEs have also emerged in sectors which have been developed only more recently (marketing, communications). Small in size and ignored by the literature on industrial relations in Luxembourg in terms of worker rights, SEs have only had a modest impact on job creation despite the fact that SE provisions in national labour law, as this chapter will suggest, have impacted positively on the development of worker par-

1. Loi du 25 août 2006 1. concernant la société européenne (SE), la société anonyme à directoire et conseil de surveillance et la société anonyme unipersonnelle; 2. modifiant la loi modifiée du 10 août 1915 concernant les sociétés commerciales et certaines autres dispositions légales; 3. modifiant la loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises; 4. modifiant la loi modifiée du 30 mars 1988 sur les organismes de placement collectif; 5. modifiant la loi du 20 décembre 2002 concernant les organismes de placement collectif; 6. modifiant la loi du 25 juillet 1990 concernant le statut des administrateurs représentant l'Etat ou une personne morale de droit public dans une société anonyme; 7. modifiant la loi du 4 décembre 1992 sur les informations à publier lors de l'acquisition et de la cession d'une participation importante dans une société cotée en bourse; 8. modifiant la loi du 13 juillet 2005 relative aux institutions de retraite professionnelle sous forme de sepcav et assep ; Mémorial A, Number 152, 31 August 2006.

ticipation rights by integrating the related Directive 86/CE/2001 into worker participation law.

The legal framework on worker participation, contextualised through laws passed in the 1970s on intra-company worker involvement and in 2004 on general collective bargaining and trade union representativeness, has remained unaltered. The Labour Code of 2006 includes all existing labour law provisions.[2] Abolishing distinctions between blue-collar and white-collar workers in the private sector by introducing a single status in 2008[3] put an end to distinctions in the context of European Work Council law (Seifert 2011). It is therefore not surprising that legal provisions for SEs on trade union involvement, election procedures, government monitoring and information sharing by the management and their employees have come to be embedded in a long tradition of social dialogue at the company and national levels. When transposing SE provisions, it was acknowledged in accordance with objectives put forward by the European Union that a new legal business entity has the potential to attract foreign capital, generate new revenues and constitute an incentive for new market opportunities for resident companies at the transnational level (Streeck and Vitols 1995; Gold and Schwimbersky 2008). New SE Directive-based national business provisions were introduced to adapt and complement the commercial law of 1915 to better accommodate company mobility within Europe's growing internal market.

This contribution analyses the dynamics of worker participation in the European Company in Luxembourg. Section 2 situates SE legislation within the national legal landscape. Sections 3 and 4 provide a general overview of SEs in Luxembourg and identify research and information gaps. The final section identifies potential negative and positive drivers behind the implementation of SEs in Luxembourg. The research draws on findings from governmental and social partners' position papers, in-

2. Loi du 31 juillet 2006 portant introduction d'un Code de Travail; Mémorial A, Number 149, 29 August 2006.
3. Loi du 13 mai 2008 portant introduction d'un statut unique pour les salariés du secteur privé et modifiant: 1. Le Code du travail; 2. le Code des assurances sociales; 3. la loi modifiée du 8 juin 1999 relative aux régimes complémentaires de pension; 4. la loi modifiée du 4 avril 1924 portant création de chambres professionnelles à base élective; 5. le chapitre VI du Titre I de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire; 6. la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu; 7. la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat. ; Mémorial A, Number 60, 15 May 2008.
4. Loi du 10 août 1915 concernant les sociétés commerciales; Mémorial A, Number 90, 30 October 1915.

terviews with stakeholders and an analysis of 9 out of a total of 25 Luxembourg-registered (August 2012) European companies.

2. The European Company in Luxembourg's company law landscape

2.1 The reinforcement of worker involvement

Directive 2157/2001 on provisions governing the creation of an SE and the related Directive on worker involvement in SEs were simultaneously transposed into national law in 2006. The choice to opt for two pieces of legislation, when many EU Member States preferred a single legal text, represented a procedural challenge in the transposition process. Elaborated by two different government administrations (the Ministry of Justice for the SE Directive and the Ministry of Work and Employment for the Worker Participation Directive) and examined by two parliamentary committees with distinct competences, the texts were transposed with considerable delay. Explanations of why Luxembourg did not comply with the transposition deadline, originally set in 2004, are of a procedural rather than a strategic nature. Discussions on the SE Directive had commenced earlier in 2004 in the parliamentary judicial committee, while parliamentary debates on worker participation rights in SEs started in 2005 in the committee on work and employment. Documents related to parliamentary work on draft texts suggest that the one-year transposition process was in part due to amendments to remove obstacles to worker participation. Apart from assessments issued by the major trade and professional associations, the directives were scarcely debated in public.

At the procedural level, the government, aware of the significance of the SE legislation as a potential contributor to diversifying the economy by attracting foreign capital and by providing resident companies with transnational business opportunities, was to base worker participation provisions less on innovatively overhauling policies on worker participation rights at corporate governance level, but rather on hypothetical and pragmatic grounds to assure a continuation of existing rights in a changing economic environment. It was the government's main objective to avoid driving a wedge between business interests and the implementation of the dualistic corporate governance system, on the one hand, and worker involvement within potential SEs, on the other.

Added to provisions stipulated by Directive 2157/2001 – that is, the setting up of a special negotiating body (SNB), the negotiation of agreements and contents, provisions regarding the *organe de représentation* – the law provides in an opening article both for a definition of worker participation at a broader level and for participation through board-level representation. Employee participation under Article L-441-2 of the Labour Code is perceived as 'information, consultation, participation and every other mechanism with which employee representatives can exert an influence on decisions taken by the company'. In line with standard rules stipulated by the Directive, information and consultation rights for the *organe de représentation* remain similar to rights granted to joint employment committees. Although the definition of both board-level representation and participation shares a long tradition within social dialogue in Luxembourg, Seifert (2011) argues in favour of harmonising the various notions of information to 'envisage modifying the many provisions guaranteeing that staff delegations have the right to *give their advice* ... Giving advice is here to be understood as being informed and consulted'. While participation is acknowledged in the opening chapter of the law, specific areas where consultation and information is to occur remain undefined, unlike for provisions related to other company statuses.

2.2 Introduction of the dualistic corporate governance system

The lengthy transposition process of both directives was triggered by criticisms put forward by the social partners and the *Conseil d'Etat* in their respective assessments. While the initial government draft was intended to give less priority to worker involvement, legal provisions were nonetheless reinforced by amendments requested by both the *Conseil d'Etat* (Conseil d'Etat 2006) and the unions. Although no *opposition formelle*[5] to the introduced draft laws was voiced on the failure to account for worker rights in the drafts, which would have led to compulsory amendments, changes to the draft were of a voluntary character

5. The State Council is tasked with assessing every law that passes the first stage of parliamentary intervention, acting as an independent institution which functions similarly to a second parliament. No law is passed without the State Council's final approval and it remains within its legal power to voice its disapproval with a law ('opposition formelle'), which must be addressed by the Parliament in the draft legislation before it is again passed to the State Council for a second and final assessment.

without being called into question by the government. The often-applied *rien que la directive* (nothing but the Directive) principle was disregarded and parliamentary discussions resulted in a series of contextual amendments. The SE legal business entity is in essence modelled on the existing SA business structure, for which participation rights were given legal status by the 1974 law on worker councils in companies employing more than 150 workers. Further, the opportunity was seized to agree on the introduction of a new corporate governance system into the still applicable general commercial law of August 1915. Although most of the currently established SEs (Figures 1 and 2) in Luxembourg have opted for the monistic (one-tier system) corporate system, with a supervisory board, the dualistic system (two-tier system) with a *directoire* (management board) and a *conseil de surveillance* (supervisory board) has been perceived as a strategic driver for boosting the business environment and for following the positive trend of business establishments in Luxembourg.

However, in practical terms, despite the fact that the dualistic corporate system as a new element of SE law was not called into question by shareholders, the choice given to companies between a monistic or a dualistic governance board structure posed a fundamental problem in terms of worker participation rights in SEs for trade unions and the *Conseil d'Etat*. Through the introduction of the two-tier system and an initial modest approach to participation rights for employees, there was a risk that these would be undermined if the 1974 law on worker councils in the SA, on which the SE is based, remains unmodified: as the legal framework has stipulated since transposition, it would in theory be possible for a company to opt for both dualistic governance and to circumvent worker participation rights by adopting the SE legal form in line with SE provisions. According to a transformation scenario of an SA into an SE at the national level, worker participation rights would be respected in this newly created SE only if they existed before transformation in line with the 'before-and-after principle' under Article L.443-5. Professional and business associations argued for the status quo on the basis that additional worker participation rights in the SE law through a modification of the 1974 legal framework are detrimental to the success of the new company form and to the setting up of new businesses. Often labelled an element rendering the creation of an SE more complex (Ernst & Young 2009: 151), worker participation in SEs has been made legally binding, though to some extent coincidentally, through adaptation and modernisation of the existing legal framework.

2.3 Trade union and government involvement

Other reform elements to reinforce employee participation are the involvement of trade unions in the setting up of the SNB and the control of elections by a government agency, the *Inspection des Travaux et des Mines* (ITM). As for trade unions, the 2006 law accords with various provisions to respect national cultures of industrial relations (Article 3b), although trade union involvement is not a new legal ingredient in the construction of worker involvement in Luxembourg, as it builds upon joint committee provisions and EWC regulations in which both trade union assistance and involvement are given legal status. According to the 2004 collective bargaining law (Chapter 3), trade union involvement in the SE (as in the EWC) is by law based on the 'national representativeness' principle: in other words, only trade unions with national representativeness are eligible for representation at SNB level.[6] Unlike worker participation in Luxembourg's EWCs, with regard to which trade unions could be a major initiator, the management is the only initiator of worker participation when an SE is being created. Research shows, however, that trade union involvement in general, and in particular at SE level, has been limited, if not non-existent. The main trade unions underline that trade union involvement reinforces worker rights, but also that they still have little experience due to the fact that the majority of current SEs in Luxembourg perform activities without employees and unions are thus not involved (unlike in EWCs). Nonetheless, the law makes trade union involvement at the intra-company level legally binding, similar to the legal provisions provided for them in national collective bargaining arenas.

The ITM is closely associated with a second legal pillar of worker rights reinforcement. Missions more broadly include the enforcement of legal provisions on workers' rights and every aspect of working conditions, as well as the monitoring of national intra-company and sectoral social elections.[7] In the context of the SE, the ITM performs a twofold mission: first, the a priori control over SNB elections in SEs and, more particularly, the monitoring of those elections where representatives to the SNB are elected by the entire staff of the company in case no staff delegations

6. Three elements define 'national representativeness': the power to mobilise support in a nationwide conflict, to be active in the major business sectors and to obtain significant results in social elections.
7. Loi du 21 décembre 2007 a) portant réforme de l'Inspection du travail et des mines b) modification du Titre Premier du Livre VI du Code du travail c) modification de l'article L. 142-3 du Code du travail; Mémorial A, Number 249, 31 December 2007.

exist. In practice, however, research indicates some degree of flexibility as the ITM has not yet had to interfere in the election process, but officials to some extent rely on existing legislation on SA election procedures[8] when the management makes enquiries about a future SE (or as is often the case by the consultancies involved in the creation process of an SE in Luxembourg) with regard to elections. Officials also disclose that their experience with SEs has been limited to the distribution of information and orientation assistance prior to registration. This non-interference is regarded as an indicator of legal provisions to be respected by the management. There is likely to be some awareness in the setting-up phase that the law provides in theory that the government is given the legal opportunity to interfere through grand ducal legislation on election modalities, if required. This legislation has yet not passed, which may indicate that the procedure is being discreetly and efficiently respected. The ITM also supervises the setting-up procedure under Article L. 444-5, the objective being that the process is clear from the outset: if worker participation rights in SNBs or in SEs at a broader level are disregarded, fines of 251 to 10,000 euros apply. Again, this penalising provision has never been enforced, which is also the case with regard to public limited companies, where the same provision applies.

3. Facts and figures

The number of SEs in Luxembourg increased from 18 in 2011 to 25 in August 2012 (ETUI 2012). The most recent SEs were established in March 2012 (Eurofins Scientific SE, Pyramid Sports Marketing SE) or moved to Luxembourg in April 2012 (Sword Group SE, which transferred its registered seat from France). The first SEs were registered in 2005 (Beteiligungs und Investment SE, International Chemical Investors SE, Afschrift SE). According to the only available data from the National Statistical Office STATEC for November 2010, 45 employees worked in 14 European Companies. While the impact on job creation has been moderate, the setting up of transnational business opportunities

8. Règlement grand-ducal du 24 septembre 1974 concernant les opérations électorales pour la désignation des représentants du personnel dans les comités mixtes d'entreprise et les conseils d'administration, Mémorial A, Number 249, 31 December 2007 and amended by Règlement grand-ducal du 17 juillet 2008 portant modification du règlement grand-ducal du 24 septembre 1974 concernant les opérations électorales pour la désignation des représentants du personnel dans les comités mixtes et les conseils d'administration; Mémorial A, Number 107, 25 July 2007.

between national and transnational partners, as intended by the European legislator, has been relevant. Luxembourg-based SEs share similar business traits: small in size, opting in majority for one-tier board governance structures (21 SEs: one-tier, 4 SEs: two-tier), they constitute holding-like companies and are the product of transformation (a Luxembourg and a European partner) or seat transfer from another EU Member State (for example, Elcoteq SE), which has contributed to the process's dynamism. The reverse trend of seat transfers from Luxembourg has also been observed (Heuschmid and Schmidt 2007). SEs are prevalent in the financial and chemical sectors (10 SEs in the financial sector). Despite the fact that most SEs are denominated 'empty' (with operations, without any employees), research emphasises in the majority of cases that a contact person can be identified, within the management or from a parent branch (for example, Swiss RE International SE) in Luxembourg or some other European country (for example, Eurofins SE in Brussels), representing the SE in Luxembourg.

Figure 1 **SEs in Luxembourg**

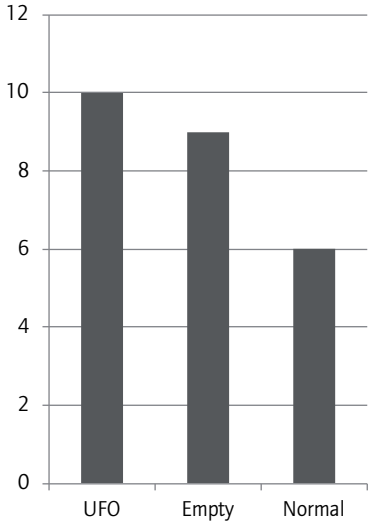
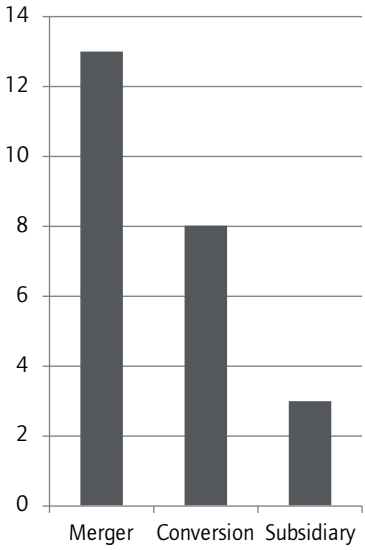


Figure 2 **Form of establishment**



Source: ETUI (2012).

4. Literature and research gaps

As emphasised before, the legal framework on worker participation in SEs must be set against the background of existing provisions in private companies since the mid-1970s. Legislation on worker participation has been formalised through the 1974 law on works councils[9] in the private sector, the 1979 law on staff delegations,[10] the 2004[11] framework on concluding collective labour agreements and the 2000 law on the establishment of European Works Councils.[12] Worker participation rights have been reinforced by the parallel development of national collective bargaining instruments (that is, the Conseil économique et social and the Comité de coordination tripartite for example) at the national level and through sector-based bargaining arenas (bipartite bargaining at the national level or quadripartite bargaining in the health sector) to decentralise bargaining arenas and to provide for expertise at the sector level. The study of worker participation rights at the company level can be placed in the general context of industrial relations in Luxembourg which, as a subject of interest, has gained significant momentum through a series of studies (Hirsch 1986; Allegrezza *et al.* 2003). The impact of the European social model on national industrial relations and the challenges faced by the financial and economic crisis have complemented the research focus of more recent studies (Thill and Thomas 2011; Seifert 2012).

Nonetheless, data on worker participation in companies in Luxembourg are still scarce, although more recent data have provided new information on economic sectors and companies. Industrial relations have focused more on the notion of Luxembourg's 'social relations model' (Allegrezza *et al.* 2003). As for SEs in particular, empirical studies on worker participation either at SNB level or in SE councils remain largely confined to a handful of pioneering studies on worker involvement (Re-

9. Loi du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes; Mémorial A, Number 35, 10 May 1974.
10. Loi du 18 mai 1979 portant réforme des délégations du personnel; Mémorial A, Number 45, 1 June 1979.
11. Loi du 30 juin 2004 concernant les relations collectives de travail, le règlement des conflits collectifs de travail ainsi que l'Office national de conciliation; Mémorial A, Number 119, 15 July 2004.
12. Loi du 28 juillet 2000 concernant l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs; Mémorial A, Number 78, 18 August 2000.

hfeldt *et al.* 2011; Conchon 2011; Feyereisen 2006; Seifert 2012) or to critical contributions by the social partners on the regulation of information and worker participation (UEL 2006; LCGB 2010; OGB-L 2009). Seifert (2011) underlines the strong relationship with the French and German legal frameworks on worker participation even if, more recently, a sui generis model of intra-company dialogue has begun to emerge in Luxembourg. With only a handful of SEs agreeing to share information publicly, the study of Elcoteq SE[13] (Stenstrand, Bruun and Neumann 2007; Rehfeldt *et al.* 2011) stands out as a rare example dealing with one of the first Luxembourg-registered SEs and the only one so far which has reached a consensus-based agreement on worker participation. The information gap is due to the nature of Luxembourg-based SEs and most of them contacted for this article have provided, insofar as they perform any activities at all, only sparse information on these activities. Research underlines that the lack of data is also related to the absence of workers in Luxembourg-registered SEs and to an insufficient public awareness of SEs, as it still has the image of an SA. In addition to a lack of academic research on the law aspects, Seifert (2012) also rightly points to the small size of Luxembourg which means, although it has a significant number of SEs, that 'legal developments cannot unfold to a similar extent as in neighbouring countries'. This is especially true for Germany, where worker participation in SEs has found more consideration in the SE literature. From this perspective, Luxembourg has not gained any vital experience up to this stage on how worker participation rights are to be accounted for in SEs and existing policies have often been considered as sufficient or flexible to meet demands.

5. Positive and negative drivers for SE establishment in Luxembourg

Negative and positive drivers impacting on the creation of SEs are of continuing interest to researchers. The initial draft legislation offered more potential for circumventing worker participation rights as the SE Directive only guaranteed worker participation rights in the establishment phase, which has been highlighted as a fundamental problem (Kluge and Stollt 2011). While no permanent and pervasive control instrument was instituted to ensure worker participation rights beyond

13. Elcoteq was declared bankrupt in October 2011.

the implementation procedure, the existing framework provided some indirect control through trade union and government involvement. 'Bypass strategies' (Conchon 2011: 35–37) to outwit worker involvement are difficult to assess due to the large number of UFO and empty SEs, which limits the scope for more case studies. The assumption on worker involvement to hamper SE creation (Ernst & Young 2009: 151; European Commission 2010: 4–5) is based on a single case study (Elcoteq SE); however, Rehfeldt *et al.* (2011) dismiss the idea that worker involvement constitutes a potential hindrance, in particular as existing worker participation did not prevent Elcoteq's transfer of seat to Luxembourg in 2007–2008. Rehfeldt *et al.* conclude that 'employee involvement in the SE is not perceived … as something "arbitrary" or as cumbersome padding' (Rehfeldt *et al.* 2011: 65), which corresponds to the results of interviews with officials claiming that managers are well aware of worker participation.

Favourable tax regimes have been identified as a second driver, despite the fact that SEs face the risk of uncertainty with regard to local tax regimes (Eidenmüller, Engert and Hornuf 2009: 8). In the case of Luxembourg, it has been pointed out (Stenstrand, Bruun and Neumann 2007: 58) that favourable tax provisions may account for its success as a prime location for SEs. Adaptations have long been required in the tax system to meet outside pressures, but so far this has not prevented companies from transferring their activities to Luxembourg (Schulz and Walther 2010). In fact, the 2006 SE law does not prescribe any tax regime for SEs, but the government made the SA tax framework apply to SEs (Administration des contributions directes 2006), which has attracted many holding companies. SA taxation applicable to SEs includes a corporate tax, a municipal business tax and a net wealth tax, with possible tax exemptions on dividends and the withholding tax.

Interviews with officials and shareholders provide a nuanced picture, suggesting that the relevant drivers go beyond those identified by the 2009 Ernst & Young study. It is rather a combination of positive drivers that underlie SE transfers to Luxembourg (in other words, geographic location, social and political stability, strength of the financial market). Rather than complex procedures (Ernst & Young 2009: 151) some degree of flexibility could be identified at this stage, although procedural obstacles will only crystallise when more 'normal' SEs with a larger number of employees and negotiations towards an agreement on worker participation are created. The reinforcement and consolidation of ac-

tivities in the financial sector constituted an incentive for the conversion into a 'normal' SE of Sparvest SE in 2011, underlining the strong link to the financial sector. Group SE for example, which transferred its seat to Luxembourg in April 2012, declared that the three Benelux countries represent the major market for the company and put forward a more surprising motive, the multilingualism of the workforce (Sword Group SE 2012).

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